United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1289

To be argued by
JOHN J. LOFLIN

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United States Court of Appeals

For the Second Circuit

FRANK J. CRIMMINS,

Plaintiff-Appellant,

against

AMERICAN STOCK EXCHANGE, INC.,

Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of New York

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BRIEF AND SUPPLEMENTAL APPENDIX OF DEFENDANT-APPELLEE AMERICAN STOCK EXCHANGE, INC.

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Docket No. 74-1289

FRANK J. CRIMMINS,

Plaintiff-Appellant,

-against-

AMERICAN STOCK EXCHANGE, INC.,

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF DEFENDANT-APPELLEE AMERICAN STOCK EXCHANGE, INC.

COUNTERSTATEMENT OF THE CASE

This appeal seeks to reverse the judgment entered below by which the United States District Court for the Southern District of New York (Lasker, J.), denied the Motion of plaintiff-appellant Frank J. Crimmins ("Crimmins") for a preliminary injunction and for summary

judgment vacating and enjoining enforcement of the determination ("Determination") of a disciplinary panel ("Panel") of the American Stock Exchange, Inc. ("Exchange") and granted the motion of defendant-appellee Exchange for summary judgment in its favor upon all claims asserted by plaintiff. The memorandum opinion of the District Court is reported at 368 F.Supp. 270 (S.D.N.Y. 1973), and is in the Appendix. (168a-191a).*

Prior Proceedings

Plaintiff's action seeks to overturn the Determination entered against him in an Exchange disciplinary proceeding conducted pursuant to the self-regulatory function assigned to national securities exchanges by § 6 of the Securities Exchange Act of 1934 (15 U.S.C. § 78f) ("Exchange Act"), Article V of the Constitution of the Exchange and the Rules of the Board of Governors of the Exchange, Rule 345.** The disciplinary proceeding was

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* Reference to the Appendix are indicated by "a" following the page number of the Appendix.

** Exchange Rule 345 is contained in a Supplemental Appendix bound herewith.

commenced on November 24, 1971 by the issuance of Charges against Crimmins by the Exchange(91a-98a). Crimmins filed an answer to these Charges in December 1971.* Before a hearing could be held on the Charges, Crimmins, on January 21, 1972, commenced the instant action in the Southern District of New York, challenged the pending proceedings and sought to enjoin the Exchange from conducting a disciplinary hearing on the Charges. Crimmin's application for preliminary injunctive relief was denied. Crimmins v. American Stock Exchange, Inc., 346 F.Supp. 1256 (S.D.N.Y. 1972). After further applications to the District Court by Crimmins, the disciplinary hearing was held on July 9, 18 and 25, 1973, before the Panel composed of five experienced members of the securities industry (167a). Prior to the Hearing plaintiff had an opportunity to examine the Exchange's documents relating to the Charges. The Exchange also offered its assistance in producing witnesses

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* This answer is not part of the record herein but was considered by the Panel in the nature of a pleading (Transcript at 79, 171-174) and later received as evidence in Crimmins' behalf. (Transcript at 350-352). References to portions of the Transcript of the Hearing not contained in the Exhibit to the Appendix will be indicated in the foregoing manner.

subject to its control upon the request of plaintiff. At the Hearing plaintiff called witnesses, testified himself, offered exhibits and, by his counsel, cross examined Exchange witnesses and objected to any aspect of the procedure he concluded was incorrect. After the Hearing, he filed an extensive brief in support of his contention that the Charges should be dismissed.

The Panel notified Crimmins of the Determination against him by letter dated August 27, 1973. (129a-132a). However, the District Court restrained imposition of any sanctions pursuant to the Panel's Determination pending further order of the Court. (See, 169a). Thereafter, on September 7, 1973, Crimmins commenced the proceedings leading to this appeal by a motion for a preliminary injunction restraining enforcement of the Determination. By consent of both parties, the proceedings in the district court were considered as cross-motions for summary judgment. On December 14, 1973, Judge Lasker entered his memorandum opinion granting summary judgment for the Exchange and dismissing plaintiff's action. (168a-191a). Crimmins appeals from the judgment of the District Court. Plaintiff's application for reargument was denied by Judge Lasker on January 16, 1974.

This is plaintiff's third appeal from the Determination of the Panel. He instituted the present proceeding in the District Court prior to seeking review within the Exchange which is provided as of right in the Exchange Rules, Rule 345(i). Subsequently, he also invoked his right to appeal the Determination to the Board of Governors of the Exchange. The Executive Committee of the Board of Governors reviewed the record before the Panel, received briefs and heard oral argument. By letter dated April 23, 1974, the Exchange informed Crimmins that his intra-Exchange appeal had been denied in all respects and, imposed the sanctions contained in the Determination. A copy of that Letter is contained in the Supplemental Appendix.

Facts

These proceedings resulted from an investigation conducted by the staff of the Exchange into extraordinary trading in the stock of Four Seasons Nursing Centers of America, Inc. ("FSN"), which was listed on the Exchange on November 12, 1968; suspended from trading on April 30, 1970; and subsequently delisted. The intense market activity in FSN followed ultimately by revelation of underlying fraud resulted in substantial losses

to the investing public. In the course of that investigation the Exchange interviewed several officers and employees of Walston & Co., Inc. ("Walston"), a regular member organization of the Exchange and the principal underwriter, investment banker and financial advisor to FSN and its subsidiaries. Walston had produced an unusually high percentage of the trading activity in FSN. (152a-154a, E-11 to E-12*; see generally, Transcript at 42-50).

As part of the investigation, Crimmins, an allied member of the Exchange and an officer, voting stockholder and manager of a branch office of Walston was interviewed by the Exchange staff on November 25, 1969 and again on January 29, 1970. (152a, Transcript at 45-46, Affidavit of Frank J. Crimmins sworn to September 7, 1973, ¶s 5 and 6). This investigation resulted in a Report of Investigation ("Report") (5a-80a) issued on March 1, 1971, which concluded that Crimmins and other officials of Walston and Walston itself had violated the Exchange Constitution and Rules. (See, 75a-80a). Subsequent to the issuance of the Report, Walston, its

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* References to the portions of the Transcript of the Hearing reproduced in the Exhibit to the Appendix are indicated by "E-" preceding the page number of the Exhibit.

President, William D. Fleming, and its Executive Vice President, Glenn R. Miller, consented to the imposition of sanctions by the Exchange.

On November 24, 1971, the Exchange preferred the written Charges against Crimmins which specified with particularity the violations of Exchange Rule 345 of which he was accused. The Charges alleged, in substance, that Crimmins:

> 1. Engaged in conduct inconsistent with just and equitable principles of trade involving the solicitation of and concerted efforts to promote interest and market activity in the stock of FSN while maintaining special relationships with the principal officers of FSN, including extension of substantial credit by the officers to him, and while continuing to hold, both directly and indirectly, substantial undisclosed interests in FSN stock.
>
> 2. (i) In the course of an investigation by the Exchange made material misrepresentations concerning the extent of his personal indebtedness to the principal officers of FSN arising out of his credit purchase of 30,000 shares of FSN stock for $650,000.
>
> (ii) Engaged in transactions off the Exchange in FSN stock without requesting or receiving permission of the Board of Governors, contrary to Exchange Rule 5.
>
> 3. Engaged in conduct inconsistent with just and equitable principles of trade in that he violated Section 220.7(a) of Regulation T (12 C.F.R. § 220 et seq.) by arranging for credit terms more favorable than those permitted by Regulation T in connection with his purchase in November 1968 and March 1969 of 20,000 shares of FSN stock. (91a-98a).

At the Hearing the Exchange presented evidence to support the Charges and Crimmins, represented by his attorneys, cross-examined Exchange witnesses and presented evidence in rebuttal. Briefly,* as to Charge 1 (conduct inconsistent with just and equitable principals of trade) it was demonstrated that Crimmins had established a close personal as well as business relationship with principals of FSN, traveled frequently to attend meetings and social occasions with them, had opened and serviced brokerage accounts for them and their associates and was instrumental in introducing FSN principals to persons in the securities industry who arranged for the purchase of significant amounts of FSN securities. (E-81 to E-83, E-125 to E-128, E-137 to E-138, E-141, E-177 to E-180, E-187 to E-188, E-206 to E-209, E-228, E-274). The evidence further showed that Walston and Crimmins in particular actively promoted the distribution of FSN securities. (E-130 to E-137, E-179 to E-181, E-187 to E-190). At the behest of FSN principals, Crimmins was instrumental in obtaining a specialist to handle FSN when it was determined to list the security on

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* For a more detailed outline of the facts presented at the Hearing see the Affidavit of Burton L. Knapp sworn to September 24, 1973 filed in opposition to plaintiff's motion below. (148a-166a).

the Exchange. (E-136 to E-142, E-179, E-188 to E-190). Crimmins was responsible for a significant percentage of all trades in FSN executed on the Exchange during the period that the stock was traded. (November 1968 - April 1970). (E-11 to E-12). Crimmins' trading in FSN was so extensive that he and other major producers of such trades were directed by Walston in January 1969 to confine their customer transactions in FSN to unsolicited trades. (E-181 to E-183, E-253 to E-259).

During this period of intimate contact with FSN and its principals and active promotion of these securities to institutional and private investors, Crimmins himself acquired a substantial position in FSN in a most unusual manner. Crimmins made undisclosed purchases of FSN restricted stock from FSN principals upon terms which can be described accurately as incredibly generous.* Notwithstanding the fact that there was a secondary offering of FSN registered securities on November 26, 1968 at $59.50 a share, in that same month Crimmins reached an agreement

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* Crimmins also invested heavily in FSN registered securities as exemplified by his sale in February 1969 of 4,200 FSN registered shares resulting in gross proceeds in excess of $500,000. (E-188).

to purchase 10,000 restricted share in FSN from its principals,* who had sold a substantial amount of stock in the public offering, in return for his promise to pay only $35 a share. Crimmins paid nothing on his obligation of $350,000 at that time. These shares became 20,000 shares when FSN split in January 1969.

Although the record shows Crimmins received possession of the 10,000 (pre-split) shares prior to February 24, 1969, he made no payment for these shares until March 15, 1969 when he paid only $175,000, constituting 50% of the agreed price. On March 14, 1969, FSN post-split registered shares closed on the Exchange at $43.75. Thus Crimmins had FSN securities worth in excess of $600,000 (utilizing Crimmins' estimate of the correct discount for unregistered shares: 30% (E-84)) for which he was obligated to pay only $350,000. Moreover, on or about March 15, 1969, the FSN principals again rewarded Crimmins' outstanding efforts to promote their distribution scheme by allowing him to purchase an additional 10,000 restricted (post-split) shares at $30 per share upon a down payment of only $55,000, constituting less

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* Jack L. Clark, Chairman; Thomas J. Gray, Vice-President and Amos D. Bouse, Jr., Construction Manager.

than 20% of the agreed price. (E-84 to E-86, E-162 to E-177, E-192 to E-205, E-229 to E-231, E-235 to E-238, E-246).

In summary, the Panel made its Determination only after it had heard evidence of Crimmins' extensive and active promotion of and trading in FSN during a period when he was amassing a most substantial personal position in the stock, not by purchases on the Exchange but by means of private undisclosed deals with the principals of FSN which enabled Crimmins by March 15, 1969 to acquire 30,000 FSN shares for an outlay of only $230,000 and promissory indebtedness of $420,000. The Panel noted in its Determination that those shares were purchased upon "unusually favorable terms" which resulted in Crimmins "becoming heavily indebted" to FSN officers. (130a). The Panel justifiably concluded: "These relationships placed you in direct conflict with your customers and the investing public who were entitled to full disclosure of your interests." (Id.)

The evidence concerning Charge 2(i) (material misstatement detrimental to the interests and welfare of the Exchange) was essentially uncontradicted. (E-231). As a result of his purchases described above, Crimmins held 30,000 shares of FSN for which he was indebted to

FSN principals for $420,000 on November 25, 1969. When interviewed by the Exchange staff on November 25, 1969 Crimmins first indicated that he owned only 600 shares of this stock. When confronted with the FSN shareholder list he then admitted his ownership of 30,000 restricted shares but indicated that his debt therefor amounted to only $150,000. The Exchange proved the fact of the material misstatements at the Hearing by the admissions of Crimmins himself. (E-229 to E-231, E-235 to E-236).

Similarly, Crimmins does not make a serious attempt to refute the facts upon which Charge 3 (violation of Regulation T, 12 C.F.R. § 220 et. seq.) is predicated. (See, E-56). Having admitted his bargain purchases of 20,000 (post-split) shares for which he made no payment until March 15, 1969 and upon which he completed payment in 1970 after Exchange investigators had initiated inquiry into the transaction and the further purchase of 10,000 shares upon which he made only a token down payment, Crimmins was in no position to argue that the credit restrictions of Regulation T had not been violated if the Regulation was applicable. Instead, Crimmins claims that the credit restriction of Regulation T did not apply to those deals. Those arguments have been rejected by

the Panel, the Executive Committee of the Board of Governors, and the United States District Court.

Having considered the evidence presented at the Hearing, the Panel, on August 27, 1973, issued its Determination that Crimmins had violated the Exchange Constitution and Rules as alleged in Charges 1, 2(i) and 3 but was not guilty of the violation alleged in Charge 2(ii) (engaging in unauthorized transactions off the floor of the Exchange).

Because of the serious nature of the violations proved before it, the Panel disciplined Crimmins by ruling that (1) he should be barred from employment in any capacity with any member or member organization of the Exchange for a period of nine months, and (2) he should be barred from employment in a managerial or supervisory capacity with any member or member organization of the Exchange for a further period of fifteen months. (129a).

SUMMARY OF ARGUMENT

This appeal represents an attempt by a former branch manager of a member firm of the Exchange to overturn a decision of a panel consisting of other professional members of the securities industry which concluded he had violated the ethical norms of that industry as reflected in the Rules of the Exchange which he had pledged to obey. Plaintiff received detailed notice of the Charges, examined the files of the Exchange relating to the Charges prior to his Hearing, cross-examined Exchange witnesses, challenged its exhibits, produced witnesses and exhibits of his own, with the assistance of counsel, and after an adverse decision, had the entire proceeding reviewed, first in the District Court and subsequently, by the Executive Committee of the Exchange's Board of Governors. All decisions have been adverse to plaintiff on all points now before this Court.

The Exchange submits, contrary to plaintiff's assertions, that (a) the scope of review in the District Court was thorough in its analysis of plaintiff's constitutional rights and gave appropriate recognition to the congressional intent that the national securities exchanges

were to be self-regulating bodies, (b) the plaintiff received constitutional due process throughout these proceedings and (c) the sanctions imposed were warranted by the seriousness of the offenses.

Plaintiff is faced with a problem he cannot avoid: the essence of the case against him is found in his own testimony. His relationship with the top executives of FSN, his unique credit arrangements whereby he purchased FSN stock directly from them, and his material misrepresentation to the Exchange were disclosed ultimately by Crimmins himself. He made the record. The violations are clear and the sanctions are just.

ARGUMENT

POINT I

THE DISTRICT COURT APPLIED THE CORRECT STANDARD OF REVIEW.

Plaintiff argues that the district court incorrectly applied the substantial evidence test in its review of the proceedings below and failed to accord de novo review to his allegations of deprivation of due process of law. The district court's action is characterized by Crimmins as an abdication of its responsibility to make an independent examination of the record to assure compliance with fundamental fairness. (Pb at 11-12).*

With one exception, plaintiff's argument fails to specify any particular issue upon which he failed to receive appropriate review by the district court. His general allegation of deprivation of proper review is conclusively belied by the thorough consideration given by the district court to each alleged unfair practice advarced by plaintiff. The detailed analysis of the entire record and the application of the facts to the issues raised by plaintiff is totally inconsistent with

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* References to Plaintiff's Brief on Appeal will be indicated by "Pb" preceding the page number.

his charge that the district court abdicated its responsibility to review fully his claims that his constituional rights were violated by the Exchange. Plaintiff seemingly concedes that the substantial evidence test was correctly applied by the district court to some of his claims below. (Pb at 11-12). Consolo v. Federal Maritime Commission, 383 U.S. 607 (1966). He takes exception, however, to the district court's finding that the sanction imposed was not excessively severe and therefore did not violate due process (188a).

Contradicting the Congressional judgment expressed in § 6 of the Exchange Act (15 U.S.C. § 78f), Crimmins asserts that the Exchange has no expertise which it may bring to bear upon the determination of appropriate sanctions for proven violations of its Rules and of just and equitable principles of trade in the securities industry. From this assertion and an unwarranted inference drawn from a group of cases (Pb at 12), none of which concerned judicial review of a penalty imposed by a national securities exchange for exchange rule violations by a registered employee, Crimmins constructs a rule that would require independent evaluation of the conduct proven against such an employee and the selection

of appropriate sanctions by the court. The courts should not be required to perform this function. Consolo, supra. Proper review has been afforded once the court has assured itself that the penalty imposed was constitutionally within the power of the Exchange to assess, was within the sanctions permitted by Exchange Rules for the type of violation proved, and that the Exchange's discretion in selection of the sanction was not exercised in an arbitrary or capricious manner.

Crimmins' challenge to the constitutionality of the sanction imposed disregards the express command of the statute (15 U.S.C. § 78f(b)) that a national securities exchange provide by rule for the "expulsion, suspension, or disciplining of a member for conduct or proceeding inconsistent with just and equitable principles of trade." Congress has determined that suspension may be a proper sanction for violations of the type proven against plaintiff and has reposed in the Exchange the discretion to assess such sanctions. Exchange Rule 345(a) expressly provides that suspension as well as other sanctions may be imposed for violations of the type proven against Crimmins.

The district court thoroughly explored the factual and legal basis of the violations proved and affirmed the action of the Panel. In view of such violations it considered the remedial sanction imposed and determined it was within the scope of authority constitutionally delegated to the self-regulatory exchanges and that the action taken was not arbitrary or capricious. The court below fully performed its proper function. The judgment expressed by the district court does not indicate abdication of responsibility for review of the sanction imposed but rather that upon review no constitutional infirmity was found. Crimmins may disagree with the result reached by the Panel, the Executive Committee of the Board of Governors and the court below but his dissent provides insufficient basis to support a claim that he was denied proper judicial review.

POINT II

PLAINTIFF HAD FAIR AND ADEQUATE NOTICE OF THE VIOLATIONS CHARGED AND WAS NOT DEPRIVED OF DUE PROCESS OF LAW BY THE PROCEDURES EMPLOYED AT THE HEARING.

There is no dispute between the parties to this action that an Exchange disciplinary proceeding is subject to the commands of the Fifth Amendment to the Constitution. Exchange disciplinary hearings, conducted pursuant to § 6 of the Securities Exchange Act of 1934, must afford sufficient procedureal safeguards to persons charged with violation of Exchange Rules, so as not to infringe their rights to due process of law. The core of the dispute seems to turn upon the scope of those rights. Judge MacMahon, in his earlier ruling in this action, Crimmins v. American Stock Exchange, Inc., 346 F.Supp. 1256 (S.D.N.Y. 1972), held that the nature of an Exchange disciplinary proceeding "imposed upon it the requirement that it comply with fundamental standards of fair play." Id. at 1259. See, Silver v. New York Stock Exchange, 373 U.S. 341, 364 (1963); Intercontinental Industries, Inc. v. American Stock Exchange, 452 F.2d 935 (5th Cir. 1971). Plaintiff seems to contend that his Constitutional rights were violated because he was not afforded every

procedural safeguard contained in the Federal Rules of Civil and Criminal Procedure. Judge MacMahon ruled:

> "The purpose of a hearing before the Board of Governors is to allow the businessmen who run the Exchange to discover any possible violations of business rules and ethics without being burdened by the full panoply of judicial procedure." 346 F.Supp. at 1260.

The broad command of the Fifth Amendment right of due process, as applied to Exchange disciplinary hearings, is that they be conducted with "fundamental fairness". Id. at 1261. This was not intended to require a proceeding tantamount to a full trial-type hearing. Id. at 1259. Judge MacMahon stated the fundamental principles against which plaintiff's contentions must be considered:

> "The requirements of due process vary from case to case. The procedures due one person in one situation are not automatically required for another person in a different situation. At a minimum, due process generally includes notice and a hearing, although even these basics are not always required." 346 F.Supp. at 1259 (footnotes omitted).

Arnett v. Kennedy, 42 U.S.L.W. 4513, 4518-4520 (U.S. Apr. 16, 1974); Wasson v. Trowbridge, 382 F.2d 807, 811-12 (2d Cir. 1967). Applying this test to the constitutional requirements of due process in this case, Judge MacMahon approved the notice and hearing procedures of the Exchange:

> "The Exchange's disciplinary procedures, as they now stand, are thoroughly fair. In the present case, a thorough investigation was made into the background of the charges, during which plaintiff was examined in the presence of his counsel and after which an extensive report was published. Plaintiff was given an opportunity to serve a written response, prepared with the aid of counsel, to that report, and no charges were asserted against him until the Exchange determined that his response did not sufficiently explain or justify his questioned business activities. When the charges were issued, they were made in writing and were specifically detailed. Plaintiff was given adequate time to file a written answer to the charges. Plaintiff will be given a full hearing before the board with an opportunity to examine and cross-examine all witnesses and also to present such testimony, defense or explanation as he may deem proper. He is permitted to bring with him to the hearing a member of the Exchange."
> 346 F.Supp. at 1260.

In view of these findings and the clear evidence in the record that the applicable standards of due process were met by the Exchange in this case, plaintiff's allegations that he was denied notice and fair hearing must be rejected.

Fair Notice

Crimmins cites a group of cases (Pb at 13-14) which stand for the proposition that a fundamental requisite of due process is fair notice of the charges before commencement of an administrative proceeding and that such notice must reasonably apprise the accused of

the claim against him. He argued below that these requirements were not met by this disciplinary proceeding. The Exchange disagreed on the basis that the Charges fairly informed plaintiff of the claims against him. The district court (Lasker, J.) after its independent review of the notice provided by the Charges, held:

> "We believe these charges were more than sufficiently clear and detailed to permit an effective defense, and that they were framed with adequate specificity to set the framework of relevance necessary to govern the proceeding. Douds v. International Longshoremen's Association, 214 F.2d 278, 283 (2d Cir. 1957)." (174a)

See also, Mullane v. Central Hanover Bank and Trust Co., 339 U.S. 306, 314 (1950); Intercontinental Industries, Inc. v. American Stock Exchange, 452 F.2d 935, 941-42 (5th Cir. 1971); Woodbury v. McKinnon, 447 F.2d 839 (5th Cir. 1971).

Plaintiff's attempts at pages 15-18 of his Brief, to create ambiguities and misunderstandings respecting the Charges and to fragmentize Charge 1 into several separate allegations are disingenuous. The Charges clearly state that Crimmins violated the ethical standards of the securities industry by his course of conduct in connection with FSN, its securities and its principal officers. (See, E-44). Specifics are provided including his extraordinary stock transactions with FSN's top executives which left him heavily in debt

to them for his purchase of FSN stock at a time when he was actively selling FSN securities to the public. The Charges are further amplified by details supplied to plaintiff in the Report which he received months before the Hearing.

Interrogatories

Plaintiff also asserts that he was denied due process by the refusal of the Exchange to respond to his demand for interrogatories. (99a-114a). (Pb at 18-19). There is no constitutional right to demand answers to interrogatories in an administrative proceeding of the type in question. See Villani v. New York Stock Exchange, Inc., 348 F.Supp. 1185 (S.D.N.Y., 1972), modified, 367 F.Supp. 1124 (S.D.N.Y.), aff'd sub. nom., Sloan v. New York Stock Exchange, Inc., 489 F.2d 1 (2d Cir. 1973; N.L.R.B. v. Interboro Contractors, Inc., 432 F.2d 854 (2d Cir. 1970), cert. denied, 402 U.S. 915 (1971). Cf., Crimmins v. American Stock Exchange, Inc. 346 F. Supp. 1256 (S.D.N.Y., 1972). Plaintiff was given fair and adequate notice of the violations alleged against him in the Charges. (172a-174a). He was given an opportunity to inspect all of the documents to be offered by the Exchange prior to the Hearing. (Knapp Affidavit, ¶22, 164a-165a).

The refusal of the Exchange to respond to plaintiff's interrogatories did not conflict with applicable constitutional standards. The district court so held. (176a). The notions of fundamental fairness embodied in the concept of due process of law do not mandate a legislative response as elaborate as the Federal Rules of Civil Procedure. The Rules are justified by pragmatic requirements of Federal litigation but are not, as a whole, required by the Constitution. Plaintiff had the Charges and the background Report which provided detailed recitals of the surrounding circumstances. He came to the Hearing prepared and lost, essentially on the basis of uncontroverted facts found in his own testimony. There were no surprises; no new revelations. Crimmins was selling stock of FSN to the public at a time when he owned 30,000 unregistered shares which he purchased on extraordinary credit terms from the three principal officers of the Company and for which he owed them as much as $420,000. Crimmins asked the FSN executives to sell him some of their restricted stock. They did so on terms that are not available in ordinary arm's length commercial transactions. The facts were not disclosed at the time and were later misrepresented by Crimmins in his testimony during the Exchange investigation. The evidence at the hearing was based on Crimmins' own testimony. In a hearing

of this sort, pre-hearing interrogatories are not required by the Fifth Amendment and, in any event, they would have made no difference in these circumstances. See, Wasson v. Trowbridge, 382 F.2d 807 (2d Cir. 1967), on remand, 285 F.Supp. 936 (E.D.N.Y. 1968).

New Charges

Crimmins asserts that he was not given a fair hearing because new charges were allegedly raised during the course of the Hearing. Crimmins bases his objections upon selected isolated bits of testimony. The record and the Determination show that plaintiff was not found guilty because of these minor references to extraneous matters and that no prejudice resulted therefrom.

The Panel accorded plaintiff every reasonable procedural safeguard at his Hearing for the purpose of ensuring the protection of his right to a fair hearing, including: the right to counsel (after a court determination that the right to counsel was not requisite to a fair hearing under these circumstances, Crimmins v. American Stock Exchange, Inc., 346 F.Supp. 1256, (S.D.N.Y. 1972)); the right to cross examine all witnesses presented for the Exchange (Transcript at 24); the right to present witnesses in his behalf; the right to introduce documentary evidence in his behalf (Transcript at 158); the cooperation of the Exchange in securing the presence

to testify of persons over whom it had any power to direct an appearance (Transcript at 49-50); the right to copies of all papers relied upon by the Exchange; the right to inspect and freely copy and to introduce all documents possessed by the Exchange relating to the issues at the hearing (Transcript at 158)*; and the right to object to the introduction of evidence. This was not a civil trial, yet plaintiff had available and used virtually the full range of procedural rights that would be expected in court. Nevertheless, plaintiff now asserts that the determination must be vacated because he was denied his right to a fair Hearing. His arguments are insubstantial.

(1) Crimmins first asserts that he was prejudiced by a finding that he had violated a duty to disclose to his customers his special relationship with and his stock purchases from FSN principals. This is an example of Crimmins' efforts to misconstrue or fragmentize the Charges against him and to assert Constitutional objections based upon his own characterizations.

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* Before the Hearing commenced Special Independent Counsel for the Exchange made all documents in his possession, relating to this case, available to plaintiff's counsel for inspection, copying and use. (Knapp Affidavit, ¶ 22, 164a-165a).

Charge 1 gave him notice that his activities involving FSN securities and its top officers had placed him in a position where his interests conflicted or appeared to conflict with those of his customers. (92a-93a). In its examination of the facts concerning Crimmins' ethical violations, it was perfectly proper for the Panel to inquire into the extent to which these activities had been disclosed. Had this inquiry produced credible evidence that full disclosure had been made, the Panel could have given it appropriate weight. Crimmins' own testimony precluded such a defense. (E-260 to E-261). Moreover, Crimmins' witness, Alfred J. Rauschman, former Vice President of Walston, testified that in his opinion, because of Crimmins' involvement with FSN and his indebtedness to its principals, Crimmins should have made such disclosure to his customers. (E-119 to E-120).

(2) The allegation that the Determination was based on Crimmins' failure to clear his purchase of FSN restricted securities with Walston is unsupportable. The relationship with FSN officers, Crimmins' access to inside information, and his huge debt to Messrs. Clark, Bouse and Gray all played a part. If there had been full disclosure the possibly ameliorative effect could have been evaluated by the Panel, but the critical facts were not revealed until discovered by the Exchange in its investigation.

Crimmins correctly states that Charge 1 does not specify an issue of lack of disclosure to Waltson and there is no indication in the Determination of reliance upon the isolated comments cited by plaintiff. There was an abundance of unobjectionable evidence (essentially Crimmins' testimony and data on trading activiy in FSN) to support the Determination. Basically, the Panel concluded on the basis of the record before it that Crimmins' behavior as an investor promoting his own interests was incompatible with his role as a securities advisor and salesman to public customers of Walston.

(3) Crimmins doesn't even attempt to show a connection between the Determination and one Panel member's passing observation that Crimmins might have offered the FSN investment to his customers or his firm. (Pb 21, E-270 to E-271).

(4) Concerning the reference to transactions in Polycast Technical Corporation securities (Pb 21, E-183 to E-186), (a) the question was properly asked by Exchange counsel in his attempt to develop the full course of dealing between Crimmins and FSN principals as fairly specified in Charge 1, (b) there was no indication and certainly no finding that there was intrinsic inpropriety in this deal, standing alone, (c) the Chairman correctly admitted the

testimony for the limited purpose set out above (a) and ruled:

> "I will let him answer the question. We will later determine to what extent, if any, weight should be given to his response." (E-186). (emphasis supplied).

and (d) there is no indication that the Panel gave Crimmins' brief testimony explaining this transaction any particular weight other than as a further example of the special relationship specified in Charge 1.

(5) Exchange counsel's rhetorical question as to the motivation of the FSN principals and Crimmins in connection with his bargain purchase of FSN restricted securities was a fair comment on the evidence concerning these purchases, matters clearly specified in Charge 1. The characterization of such comments is plaintiff's and was not raised before the Panel as a charge that plaintiff was bribed. The record clearly shows that the reference to United States v. Jack L. Clark, 72 Crim. 1356 (S.D.N.Y. 1972), was raised by Crimmins himself and that the Panel was not misled thereby. (E-263 to E-264).

(6) The Exchange never alleged at the hearing that plaintiff breached the "free-riding" rules of the NASD. Indeed, it was Crimmins' counsel, if anyone, who unsuccessfully attempted to take the proceedings beyond the matters alleged in the Charges. (E-189 to E-191).

Plaintiff would have the Court concluded that the Charges were vague and mysterious, incomprehensible to a man who at the time the Charges were issued had spent 15 years in the securities business. The five Panel members and the five members of the Executive Committee of the Exchange, all from the same business, had no trouble in understanding the Charges or the evidence that established Crimmins had violated the basic ethical norms expected of men in his position. Neither the Charges nor the conduct of the Hearing deprived plaintiff of due process of law.

POINT III

"CONDUCT OR PROCEEDING INCONSISTENT WITH JUST AND EQUITABLE PRINCIPLES OF TRADE" IS NOT AN UNCONSTITUTIONALLY VAGUE STANDARD AS APPLIED TO THIS PLAINTIFF IN THIS DISCIPLINARY PROCEEDING.

Crimmins argues that the Exchange deprived him of due process because it disciplined him for violation of an allegedly unconstitutionally vague standard: "Conduct or proceeding inconsistent with just and equitable principles of trade." He no longer argues, as he did below, that this standard is impermissibly vague on its face. He now asserts merely that the standard was unconstitutional as applied to the facts of this case.

This standard, well known in the securities industry, specifies the ethical norms by which that community governs itself. Self-regulatory bodies such as the Exchange are specifically required by section 6(b) of the Securities Exchange Act (15 U.S.C. § 78(f)(b)) to adopt rules which "include provision for the expulsion, suspension, or disciplining of a member for conduct or proceeding inconsistent with just and equitable principles of trade." The Exchange has complied with the Congressional command. Exchange Constitution, Art. V. Sec. 5(h);

Exchange Rule 345(a)(4).* The Crimmins disciplinary proceeding was instituted pursuant to the Exchange's duty to foster such ethical standards within the securities industry and to detect and discipline persons subject to its jurisdiction who violated these principles.

Plaintiff's argument does not demonstrate that his due process rights were violated in this case. He falls into error by relying upon the test of vagueness by which courts measure criminal statutes imposing the threat of imprisonment upon the general public in cases such as Connally v. General Construction Co., 269 U.S. 385 (1926). (Pb at 27). Yet that case itself recites the crucial distinction which causes plaintiff's argument to fail here:

> "The question whether given legislative enactments have been thus wanting in certainty has frequently been before this court. In some of the cases the statutes involved were upheld;

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* See identical provisions in the Constitution (Art. XIV, Sec. 6) and Rules (Rule 345(d)(1)(dd)(i)) of the New York Stock Exchange, 2 CCH New York Stock Exchange Guide, ¶ 1656 at 1095 (1973); ¶2345 at 358902 (1972). See also, 15 U.S.C. § 78o-3(b)(4)(A), which mandates suspension of a member of national securities association for violation of a national securities exchange rules prohibiting conduct defined by the standard at issue.

> in others, declared invalid. The precise point of differentiation in some instances is not easy of statement. But it will be enough for present purposes to say generally that the decisions of the court upholding statutes as sufficiently certain, rested upon the conclusion that they employed words or phrases having a technical or other special meaning, well enough known to enable those within their reach to correctly apply them, Hygrade Provision Co. v. Sherman, 266 U.S. 497,502; Omaechevarria v. Idaho, 246 U.S. 343, 348, or a well-settled common law meaning, notwithstanding an element of degree in the definition as to which estimates might differ, Nash v. United States, 229 U.S. 373, 376; International Harvester Co. v. Kentucky, supra, p. 223, or, as broadly stated by Mr. Chief Justice White in United States v. Cohen Grocery Co., 255 U.S. 81, 92, 'that, for reasons found to result either from the text of the statutes involved or the subjects with which they dealt, a standard of some sort was afforded.'" 269 U.S. at 391-92. (Emphasis supplied).

Hygrade, supra, considered a state statute regulating the labeling of meat. Plaintiff objected that the terms "Kosher" and "orthodox Hebrew religious requirements" were unconstitutionally vague. The Court upheld the statute, stating:

> "Furthermore, the evidence, while conflicting, warrants the conclusion that the term 'Kosher' has a meaning well enough defined to enable one engaged in the trade to correctly apply it, at least as a general thing. If exceptional cases may sometimes arise where opinions might differ, that is no more than is likely to occur, and does occur, in respect to many criminal statutes either upheld against attack or never assailed as indefinite." 266 U.S. at 502. (Emphasis supplied).

Omaechevarria, supra, upheld a criminal statute regulating grazing challenged for indefiniteness in the use of the term "range":

> "Men familiar with range conditions and desirous of observing the law will have little difficulty in determining what is prohibited by it." 246 U.S. 348.

United States v. National Dairy Corp., 372 U.S. 29 (1963), considered a portion of the antitrust laws (15 U.S.C. § 13(a)), which forbade sales of goods at "unreasonably low prices" to injure competition. The Court refused to consider a facial attack for vagueness, and held that, applied to the business community of merchants, the statute was constitutional because a merchant was adequately warned that sales below his cost without legitimate commercial objectives were proscribed. See, United States v. Harriss, 347 U.S. 612, 617 (1954).

See also, Nash v. United States, 229 U.S. 373 (1913), upholding a criminal conviction under the Sherman Act against a vagueness challenge partially because the language "conspiracy in restraint of trade" and "conspiracy to monopolize trade" incorporated the common law meaning associated with those terms.

See Don D. Anderson & Co. v. SEC, 423 F.2d 813 (10th Cir. 1970), which was an application to review a

disciplinary action taken against plaintiff by the NASD, an association registered under 15 U.S.C. § 78o -3. Plaintiff, a member of the NASD, was suspended from membership and fined, pursuant to self-regulatory powers delegated to the NASD by the Exchange Act for violation of the following association rule:

> "A member, in the conduct of his business. shall observe high standards of commercial honor and just and equitable principles of trade." 423 F.2d at 814, n. 1 (Emphasis supplied).

The SEC's denial of review was affirmed against plaintiff's contention that the standard applied was void-for-vagueness. The case is apposite, not for the reason that it held the above standard constitutional, but because there is no indication in the opinion that such a challenge was even essayed by plaintiff. Rather, plaintiff unsuccessfully challenged as unconstitutionally vague the SEC regulation requiring maintenance by a broker of not less than $5,000 "net capital," violation of which was found by the NASD to have transgressed just and equitable principles of trade.

These authorities demonstrate the lack of merit in plaintiff's allegation.

Plaintiff cites no case which even discusses a void-for-vagueness challenge upon the ethical standard

applied in this case. Rather, relying on Re Ruffalo, 390 U.S. 544 (1968), plaintiff asserts that the standard as applied in Charge 1 was impermissibly vague because he had no reason to know the conduct with which he was charged violated the ethical principles of the securities industry. Plaintiff bases this argument on three assertions: (1) other individuals in the securities industry approved his conduct, (2) at the time of his activity it was unclear whether his conduct constituted a violation of the securities laws, and (3) the Exchange had failed to enact rules specifying that his course of conduct was in violation of "just and equitable principles of trade."

Crimmins' reliance upon Ruffalo is misplaced. In Ruffalo, the Supreme Court held that an attorney had been improperly disbarred by the Sixth Circuit which had acted solely on the basis of finding against him in a state disbarment proceeding. The rationale of the decision was that petitioner had not been given any notice of the charge ultimately relied upon the Sixth Circuit. Mr. Justice White concurred, arguably finding the Sixth Circuit's disbarment standard void-for-vagueness. Yet his concurring opinion recognizes the rule applicable here that a standard which might be impermissibly vague

if applied to laymen is not subject to such challenge if it can be reasonably understood by the members of the professional group to which it applies and the specific conduct alleged would be seen as unethical or improper by a reasonable member of that profession:

> "Even when a disbarment standard is as unspecific as the one before us, members of a bar can be assumed to know that certain kinds of conduct, generally condemned by responsible men, will be grounds for disbarment. This class of conduct certainly includes the criminal offenses traditionally known as malum in se. It also includes conduct which all responsible attorneys would recognize as improper for a member of the profession." 390 U.S. at 555.

Crimmins asserts that other individuals in the securities industry had "approved" his conduct. The record demonstrates that these so-called "approvals" were not made by persons having a responsibility to judge Crimmins' conduct and were not made on the basis of the full facts presented to the Panel. Rather, these opinions were rendered by Crimmins' fellow officers at Walston, without full knowledge of Crimmins' conduct and at times when some at least of these individuals' opinions may have been influenced by self-interested desire for FSN securities to continue to increase in value. The opinions of Alfred J. Rauschman, former Vice President of Walston, were rendered after the fact. Mr. Sour, a member of the

Panel with 15 years experience in the securities industry characterized Rauschman's testimony as "the most extraordinary testimony I have seen in my own experience." (E-270). The record clearly demonstrates the distinction between the present facts and those in the cases cited by plaintiff and rebuts plaintiff's assertion that he was acting on the basis of approvals by his superiors.

Crimmins next alleges that his activities were considered to be legally proper in 1969, citing SEC v. Lum's, Inc., 365 F. Supp 1046 (S.D.N.Y. 1973). The conclusion is erroneous and the reliance misplaced. Lum's was an SEC enforcement proceeding alleging violation of the anti-fraud provisions of the securities laws. The brokerage firm and its salesman were charged with "tipping" investors as to non-public material information concerning the issuer. Apart from the significantly different fact situation which Crimmins ignores in his brief, Lum's was an action for violation of the securities laws; not an Exchange disciplinary proceeding for violation of the basic ethical norms of the securities community. Moreover, the party exculpated in Lum's was the brokerage firm which was charged only with vicarious liability. The liability of the individual representative who overtly violated the statute by "tipping" investors was clear

and was not even before the court as he had consented to entry of a permanent injunction. The Lum's case cannot be read as judicial approval of the individual defendant's conduct.

Finally, Crimmins suggests that the failure of the Exchange to establish rules defining the precise metes and bounds of ethical conduct renders the standard vague as applied. The statute, Exchange Act § 6(b) (15 U.S.C. § 78(f)(b)) mandates the enactment of rules penalizing violation of "just and equitable principles of trade." The Exchange is not required to specify and define by rule every possible type of conduct which might breach this standard. The Constitution does not impose such an unreasonable burden. Arnett v. Kennedy, 42 U.S.L.W. 4513, 4520-22 (U.S. Apr. 16, 1974). The Supreme Court held in Arnett that the test "'for such cause as will promote the efficiency of the service'" was not an unconstitutionally vague standard when applied to disciplinary proceedings in the federal Civil Service which resulted in petitioner's dismissal. The reasoning articulated by the Supreme Court applies to this case:

> "Congress sought to lay down an admittedly general standard, not for the purpose of defining criminal conduct, but in order to

> give myriad different federal employees performing widely disparate tasks a common standard of job protection. We do not believe that Congress was confined to the choice of enacting a detailed code of employee conduct, or else granting no job protection at all."
> 42 U.S.L.W. at 4520-21.

In any event plaintiff cannot sustain his complaint of vagueness as to the conduct found violative pursuant to Charge 1. His activities involved fundamental breaches of ethical behavior necessary for members of the securities community. Crimmins is an experienced registered representative and branch manager who supervised other securities salesmen. He pledged on several occasions dating back to 1956 (e.g., 136a-137a) to abide by "just and equitable principles of trade" and is therefore chargeable with the duty of knowing the fair meaning of the Exchange Rules. Ware v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 24 Cal. App. 3d 35, 100 Cal. Rptr. 791 (Dist. Ct. App. 1972), aff'd, 42 U.S.L.W. 4021 (U.S. Dec. 4, 1973). The violation of Charge 1 does not concern technical or uncertain ethical norms, but rather, basic standards of fair dealing of which Crimmins must be aware. Therefore, as applied to this case, there was no unconstitutional vagueness in the standard by which Crimmins' conduct was measured.

POINT IV

THE FINDING OF VIOLATION ON CHARGE 2(i) IS INCONTROVERTIBLE.

For the first time in these judicial proceedings, Crimmins urges as a ground for appeal that the finding of violation on Charge 2(i) (material misstatement to the Exchange) was erroneous.* Plaintiff's attempt to minimize the importance of Charge 2(i) simply fails to withstand comparison with the facts. On several occasions he pledged to abide by the Constitution and Rules of the Exchange. (See, e.g., 136a-137a.) Exchange Rule 345(a)(2) explicitly states that a registered employee is subject to specified disciplinary action, including suspension, if he has been guilty of: "making a misstatement to the Exchange." Moreover, at the outset of the plaintiff's interviews by the Exchange investigative staff, Crimmins was expressly cautioned that if he made a misstatement on a material point during the course

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* See Crimmins' principal memorandum in support of motion for preliminary injunction, especially at 2-3. In that memorandum Crimmins argued that the penalty imposed violated due process because it was too severe. The reference to Charge 2(i) (Id. at 36) was urged in support of plaintiff's contention that the penalty should have been offset by mitigating factors. However, Crimmins was unable to refute the finding of violation of Charge 2(i) which was based upon documentary evidence, consisting of his own testimony during the Exchange's investigation.

of those interviews he might be suspended or expelled. Crimmins acknowledged that he understood this warning (Transcript at 46-47). Nevertheless, during the course of the staff interview on November 25, 1969, plaintiff made a material misstatement concerning his indebtedness to principals of FSN for shares of FSN purchased on credit.

First, in the interview on November 25, 1969, Crimmins responded to a direct question by misstating the amount of FSN stock which he owned as 600 shares. Only when confronted by the Exchange Staff with an FSN shareholders' list did Crimmins admit his true ownership of 31,000 shares (E-235 to E-236). Then, when asked how he had purchased the unregistered shares Crimmins responded as follows:

> "'Question: How did you pay for the shares,' referring to the unregistered shares purchased from Messrs. Clark, Bouse and Gray.
>
> 'Answer: How did I pay for them?
>
> 'Question: Yes.
>
> 'Answer: I wrote out a check.
>
> 'Question: You didn't borrow any money to pay for them?

'Answer: No, but I sold some securities to pay for them.

'Question: But it was a cash transaction?

'Answer: Yes.

'Question: Is there any amount, either from that or anything else, owing between you, on the one hand, and Messrs. Clark, Bouse or Gray, on the other?

'Answer: Let me hear that again.

'Question: Do you owe Mr. Clark any money or does he owe you any money?

'Answer: I owe Mr. Clark, Mr. Gray and Mr. Bouse some moneys on my second commitment, which I am paying six percent interest on.

'Question: That is the second 10,000 shares?

'Answer: That's correct. I paid half of it off. I owe the balance.

* * * *

'Answer: The first 10,000 shares I paid for and I think half of the second 10,000.

'Question: Was that half of the second 10,000 paid at the time of the transaction?

'Answer: Yes, sir.'"

(E-229 to E-230).

Crimmins testified that he purchased the first 10,000 shares (pre-split) for $350,000 and the second 10,000 shares for $300,000. (E-238, E-196 to E-197). Thus, he attempted to mislead the staff on November 25 to believe that he owed FSN principals only $150,000 on these purchases. Yet, it is undisputed that at the time Crimmins actually owed them $420,000 (E-84 to E-86).

The importance of this testimony belies Crimmins' assertions of innocent mistake and immateriality. The finding of violation on this charge is particularly compelling when viewed in light of all the subsequently uncovered facts which evidence Crimmins' desire to avoid disclosure of the extent of his indebtedness because it would establish other wrongdoing on his part. Crimmins was correctly found guilty on Charge 2(i) of making a material misstatement to the Exchange.

POINT V

CRIMMINS WAS CORRECTLY FOUND TO HAVE VIOLATED REGULATION T.

The facts concerning the transactions found to have violated Regulation T (12 C.F.R. § 220 et seq.) are essentially undisputed. (See, Pb at 32). The district court found the facts to be as follows. "In November, 1968, plaintiff and FSN's three principal officers verbally agreed that plaintiff would purchase from them 10,000 shares of unregistered, restricted FSN common stock. In December, 1968, the parties executed a purchase agreement stipulating a price of $35 per share. The transaction was not executed through a brokerage account. Plaintiff made no payment at that time for the shares he received, since the agreement provided that he would make an initial payment of $175,000 (out of a total price of $350,000) by January 15, 1969, with the balance to be paid six months later. On January 8, 1969, FSN common stock split two-for-one, so that plaintiff held 20,000 post-split shares. In early March, 1969, the parties agreed to a second private purchase of 10,000 (post-split) restricted FSN shares at $30 per share. On March 15, 1969, plaintiff paid $175,000 on account of the first purchase of FSN shares and $55,000 as a down payment for

the second. On April 7, 1969, plaintiff executed a note for $245,000 to the three FSN officers representing the balance due on the second purchase." (180a-181a).

Plaintiff's challenge to the finding on Charge 3 presents issues of law which were reviewed below. The relevant portion of Regulation T, § 7(a) provides:

> "A creditor may arrange for the extension or maintenance of credit to or for any customer of such creditor by any person upon the same terms and conditions as those upon which the creditor, under the provisions of this part, may himself extend or maintain such credit to such customer, but only upon such terms and conditions." (12 CFR § 220.7(a)).

Plaintiff asserts the following reasons for his claim that the judgment of the court below, endorsing the Panel's determination that Crimmins violated Regulation T, should be reversed:

A. Crimmins was not a "Creditor" within the meaning of Regulation T.

B. Crimmins was not a "Customer" within the meaning of Regulation T.

C. Crimmins' purchases of 30,000 shares of FSN on credit were not within the regulatory purposes of Regulation T.

The district court considered each of these arguments and others which Crimmins has abandoned on this appeal. (See, eg. 180a). The treatment of these issues by the district court is so thorough that it would serve little purpose to restate Judge Lasker's findings in this

brief. Rather, incorporating by reference the analysis in the Opinion (181a-188a), the Exchange will demonstrate alternative bases for the decision below and will rebut assertions made by plaintiff.

A. Crimmins was a "Creditor."

Regulation T controls extension of or arranging for credit in connection with securities transactions by a "creditor" defined as a "member", "broker" or "dealer" as those terms are defined in Section 3(a) of the Exchange Act. (12 C.F.R. § 220.2(a),(b); 15 U.S.C. § 78c(a)(3),(4) and (5)). The district court correctly held the credit restrictions applicable to the transactions at issue on its finding that Crimmins was a "broker." (181a-182a). Moreover, contrary to plaintiff's assertion (Pb at 37) the regulation is also applicable because Crimmins was a dealer:

> "The term 'dealer' means any person engaged in the business of buying and selling securities for his own account, through a broker or otherwise, but does not include a bank, or any person insofar as he buys or sells securities for his own account, either individually or in some fiduciary capacity, but not as a part of a regular business." See, 15 U.S.C. 78c(a)(9).

Crimmins'only objection to his characterization as a "dealer" is his assertion that these purchases for his own

account were not part of his regular business. Plaintiff cites no authority for his implied assertion that a person can not have more than one "regular business." The definition of "dealer" is not to be applied restrictively in determining which persons are subject to the credit restrictions of Regulation T. United States v. Weisscredit Banca Com. E D'Invest., 325 F.Supp. 1384, 1397 (S.D.N.Y. 1971). Based upon the following facts, Crimmins should be regarded as a "dealer" and therefore a "creditor" within the meaning of Regulation T.

The unregistered FSN securities were purchased by plaintiff for his own account in the course of his regular business. Without regard to other transactions, the evidence considered by the Panel showed that plaintiff traded some 5,900 shares of FSN stock purchased on 10 separate occasions between May 14, 1968 and November 7, 1969 and sold in 1969-70. Plaintiff's net profit on these transactions was $396,862.50. In addition, he acquired the 30,000 shares involved in the Regulation T controversy which he evidently still has. (See, E-234). Plaintiff testified that he maintained at least one personal account and that he had made other transactions therein. (E-235 to E-237; Transcript at 533-534). He further testified that his installment payments for the unregistered FSN securities

were partially financed by sales from his personal account of registered FSN securities. (E-85, E-171 to E-174, Transcript at 533)

Alternatively, plaintiff was a "creditor" subject to Regulation T due to his position as an officer, branch manager, and one percent shareholder of Walston & Co., a status analogous to that of a partner in an unincorporated firm. The Federal Reserve Board has published its interpretation that a partner of a creditor firm is a "creditor" (1938 Federal Reserve Bulletin 763). The Opinion Letter rendered upon facts similar to this case (126a-128a) concludes that the same rule is applicable to one occupying a position equivalent in an incorporated firm to that of a partner. These rulings, by the agency charged with drafting and implementing credit controls in the securities market, including Regulation T, are entitled to great weight, particularly in view of the absence of contrary judicial authority.

Plaintiff's reading of In re Sutro Bros. & Co. 41 SEC 443 (1963) is completely unjustified. It is true that the SEC found the individual registered representative whose conduct was questioned liable only as an aider and abettor of the violation by his employer. Plaintiff's assertion that it restricted a representative's potential

liability to such situations is not warranted. Crimmins has assumed throughout his argument that it was somehow necessary for Walston to be involved in these transactions in order to hold him liable under Regulation T. He also asserts that these were completely private transactions, not effected by Walston or through Crimmins' account at Walston. The broad remedial purpose of § 7 of the Exchange Act (15 U.S.C. § 78g) should not be eroded by the approval of such credit transactions. The Congressional purpose of credit control will not be effective if Regulation T can be circumvented by private credit arrangements which if arranged by a creditor in a public sale of securities would be prohibited. A similar argument attempting to restrict the scope of Section 10(b) of the Exchange Act to public securities transactions was rejected in Speed v. Transamerica Corp., 99 F.Supp. 808, 830-31 (D. Del. 1951).

B. Crimmins as a "Customer."

Crimmins suggests that the district court's finding that he was a "customer" concerning the transactions at issue is unsupported by the law, the record or logic. There is no dispute as to the facts. Logically, these facts show that Crimmins purchased securities and that in connection with such purchases credit

was extended to him. On the face of these transactions and by the words of the statute, Crimmins qualifies as a "customer." (12C.F.R. § 220.2(c))

Moreover, plaintiff's argument is misdirected since there was no requirement that Crimmins himself be found to be a "customer" to hold that he violated Regulation T. However, he was the only customer in these credit transactions. Crimmin's actual argument, therefore, is with the finding that he was both a "creditor" and a "customer" in these transactions. Judge Lasker has thoroughly expounded the reasons why Regulation T was applicable to these peculiar transactions. His analysis is supported by the purpose of Regulation T and the following authorities. In re Sutro Bros. & Co., 41 SEC 442 (1963); 1938 Fed. Reserve Bulletin 763 (Federal Reserve Board Opinion Letter); 126a-128a (Opinion Letter of the Assistant Secretary of the Board of Governors of the Federal Reserve System).

C. Purpose of Regulation T.

Passing beyond the specific definitions of Regulation T, plaintiff asserts that this Court should disregard the applicability of the credit restrictions to his private purchases of FSN securities on credit terms

clearly violative of those permitted, because, he asserts, Regulation T was not intended to regulate such transactions. The Exchange Act, Section 7, provides exceptionally broad scope for the credit restrictions enacted pursuant to its mandate:

> "It shall be unlawful for any ... broker or dealer, directly or indirectly, to ... arrange for the extension or maintenance of credit to or for any customer [in contravention of Regulation T]." 15 U.S.C. § 78g(c).

Similarly, the language of Regulation T itself does not provide exceptions to the applicability of the credit limits of which plaintiff may avail himself here. (12 C.F.R. § 220.3(b)(1)(i)).

Plaintiff correctly identifies the primary purpose of these credit restrictions as the reduction of the amount of credit available for speculation on margin securities to help assure a more orderly market. See, In re Sutro Bros. & Co., 41 S.E.C. 442, 445-446 (1963). However, he misinterprets the manner in which that purpose dictates the application of the credit restrictions to the transactions at issue.

Simply stated, Crimmins had two transactions to purchase restricted FSN stock from Messrs. Clark, Bouse and Gray. On the first transaction involving some 10,000 pre-split shares for $350,000, he paid nothing down. On

the second transaction, 10,000 post-split shares for $300,000, he paid only $55,000 down. In and of itself, these purchases increased the amount of credit in the securities market. It is unrealistic to assert, as Crimmins does (Pb at 39), that these securities "were not part of the securities market." There was no contractual commitment by Crimmins to hold his stock for any prescribed period (E-266). Any sale by Crimmins permitting him to realize an increased value for his shares would violate the purpose of Regulation T. Moreover, by the mere fact that Crimmins held this stock purchased on credit he increased the potential supply of credit in the market in that his net worth as reflected by financial statements he might make would reflect the value of the stock. The fact that Crimmins did not take loans on the basis of his FSN stock is irrelevant for purposes of establishing a violation of Regulation T. (See, E-160 to E-161).

Mr. Crimmins' basic problem, insofar as Regulation T is concerned, is his desire to escape completely from the obligations he had as an officer, branch manager and registered representative of Walson & Co., a member firm. It has long been obvious that the purpose of the securities laws was to control the securities industry for the protection of the public. In doing so, Congress, the

Securities and Exchange Commission and the Board of Governors of the Federal Reserve System have imposed many inhibiting restrictions upon persons in the securities community which are not binding upon the general public. Mr. Crimmins was not free, in light of his position at Walston & Co. and his connections as a result thereof with Four Seasons Nursing Centers of America, Inc., to avoid the regulations applicable to him in the regular course of his business and become an instant layman outside the scope of the Regulation in order to seize upon a private credit advantage he could not have lawfully arranged for a customer. The findings of the panel should not be overturned.

POINT VI

THE SANCTION IMPOSED WAS JUST.

Crimmins final point is an appeal for clemency that the sanction should be reduced.

Crimmins has been found by the Panel to have violated Exchange Rules in each of the particulars specified in Charges 1, 2(i) and 3. Crimmins' conduct was not compatible with the ethical obligations required of persons in his position. He violated just and equitable principles of trade by his course of conduct in promoting FSN securities to investors at a time when he enjoyed a special relationship with principals of FSN and when he held a substantial undisclosed position in that security which he had acquired on credit from top executives of FSN. In arranging for the purchase of those FSN shares, Crimmins violated the credit limitations of Regulation T promulgated pursuant to section 7 of the Exchange Act (15 U.S.C. § 78g) which conduct was a violation of just and equitable principles of trade. (15 U.S.C. § 78f(b)). Crimmins violated the Exchange Rules which he had expressly pledged to follow by making a material misstatement to the Exchange investigative staff at a time when his other violations were not known.

The Exchange is commanded by § 6 of the Exchange Act to regulate the business ethics of persons subject to its jurisdiction, including the specific requirement that it provide for "the expulsion, suspension, or disciplining of a member for conduct or proceeding inconsistent with just and equitable principles of trade." (15 U.S.C. § 78f(b)). Accordingly, based on all the evidence presented before it, the Panel, composed of five individuals experienced in the securities industry, determined the appropriate sanction: a nine-month suspension from employment by any member firm of the Exchange and a 15-month suspension thereafter from employment in a supervisory capacity.

The penalty imposed resulting from one set of facts cannot be nicely correlated to the sanctions received by another on a different set of facts. This is particularly true where violations of different standards or different sanctioning bodies are compared. Plaintiff's arguments rest upon such fallacious comparisons. Punishment is, within statutory and constitutional limitations, a matter of sound discretion which calls for an appreciation of all of the facts, the nature of the wrong committed, and the extent of the harm inflicted on

others. Congress has committed the exercise of such discretion to the Exchange. Here, the Panel considered all of these factors and determined the appropriate penalty. This was surely not an arbitrary or capricious action. The sanction is well within the limits of penalties permitted by the Exchange Constitution and Rules. The Federal District Court has ruled the penalty to be just and constitutional. (188a-189a) The Executive Committee of the Board of Governors of the Exchange affirmed the sanction imposed, finding "the penalties imposed by the Panel are justified under the circumstances and consistent with the public interest." There is no reason for this Court to set those findings aside.

CONCLUSION

For the reasons stated above, the decision and judgment of the District Court should be affirmed with costs to the American Stock Exchange.

Dated: May 15, 1974

Respectfully submitted,

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Appellee
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Of Counsel
John J. Loflin

SUPPLEMENTAL APPENDIX

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American Stock Exchange Inc.

86 Trinity Place
New York NY 10006
212/938 2401

Paul Kolton
Chairman

April 23, 1974

Mr. Frank J. Crimmins
24 Chesterfield Road
Scarsdale, New York 10583

Dear Mr. Crimmins:

This is to advise you of the conclusions of the Executive Committee of the Board of Governors of the Exchange with respect to your appeal from the decision rendered against you by an Exchange Disciplinary Panel on August 27, 1973.

After reviewing the record of the disciplinary proceedings and the briefs and arguments offered on appeal at a hearing on April 18, 1974, the Committee determined to affirm the Panel's findings and its penalty determinations. The Committee concluded that the Panel's findings of guilt were fully supported by the record and that the penalties were justified in light of the seriousness of the violations of which you were adjudged guilty.

In fulfilling its self-regulatory obligations, the Exchange is required under the Securities Exchange Act of 1934 to take disciplinary action against those persons within its jurisdiction found to have engaged in conduct or proceeding inconsistent with just and equitable principles of trade or who have otherwise violated the rules and regulations of the Exchange designed to ensure fair dealing and to protect investors. In the present instance, the Executive Committee confirmed the decision of the Exchange Disciplinary Panel that you breached your obligations to comply with the rules of the Exchange and failed to meet the standards of conduct required of all Exchange members and their employees. In reviewing this matter, the Committee further determined that the penalties imposed by the Panel are justified under the circumstances and consistent with the public interest.

In accordance with the Disciplinary Panel's determination, you are barred effective today for a period of nine (9) months from employment with any member or member organization of the Exchange and thereafter for a period of fifteen (15) months from employment in any managerial or supervisory capacity with any member or member organization.

We trust that these proceedings have served to demonstrate the importance of full compliance with all of the Exchange's requirements and the necessity of avoiding in the future the type of business conduct which gave rise to this disciplinary action.

Very truly yours,

PK/BDK:hs

(Signed) Paul Kolton

cc: Donald Stuart Bab, Esq.
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AMERICAN STOCK EXCHANGE
RULES OF BOARD OF GOVERNORS
RULE 345

¶ 9395 **Determinations Involving Employees and Prospective Employees**

Rule 345. (a) If the Exchange determines that any employee of a member or member organization has been guilty of:

(1) any conduct which if he were a member of the Exchange would be a violation of any provision of the Constitution or of any rule of the Board of Governors of the Exchange;

(2) making any misstatement to the Exchange;

(3) violating any of his agreements with the Exchange;

(4) any conduct or proceeding inconsistent with just and equitable principles of trade;

(5) any act detrimental to the interest or welfare of the Exchange;

(6) any failure to adhere to the principles of good business practice in the conduct of his business affairs; or

(7) any other act or conduct rendering him unfit or unsuitable to be an employee of a member or member organization of the Exchange; the Exchange may disapprove or suspend or withdraw its approval of his employment by a member or member organization and the Exchange may, in addition to or in lieu of any such action, (a) censure him; (b) declare him ineligible for employment in specified capacities; and/or (c) assess a fine against him in an amount not to exceed $5000 for each offense or an aggregate of $25,000 for all offenses in respect of which the employee shall have been found guilty.

(b) If the Exchange determines that any prospective employee of a member or member organization has been guilty of any offense specified in subparagraphs (2) through (7) of paragraph (a) of this rule, or if such prospective employee was formerly employed by a member or member organization and the Exchange determines that during the period of such former employment he was guilty of any offense specified in subparagraph (1) of paragraph (a) of this rule, the Exchange may disapprove of his employment by a member or member organization or declare him ineligible for employment in specified capacities.

(c) An accusation charging an employee or prospective employee of a member or member organization with having committed an offense shall be in writing; it shall specify the charge or charges against such employee or prospective employee with reasonable detail; it shall inform the person charged that he is entitled to be present at the hearing of the charge or charges before an Exchange Disciplinary Panel selected in accordance with the provisions of Sections 1(b)(1) and 1(b)(2) of Article V of the Constitution; and it shall be signed by an officer of the Exchange or a director or manager in the division bringing the charge or charges. A copy of such charge or charges shall be served upon the employee or prospective employee either personally, or by leaving the same at his office address during business hours, or by mailing it to him at his office address or place of residence. He shall have twenty days from the date of such service to answer such charge or charges, or such further time as the Exchange in its discretion may deem proper. An answer shall be in writing, signed by or on behalf of the person charged, and shall be filed with the Secretary of the Exchange. If so expressly required in the charge or charges, the answer shall specifically indicate which statements, or portions thereof, contained in the charge or charges are denied and which are admitted, and any such statements or portions thereof in the charge or charges which are not specifically denied shall be deemed to be admitted. The answer shall also contain in reasonable detail any affirmative defense which the accused wishes to submit and shall include any documents which the accused wishes to submit in support of the answer.

(d) Upon the answer being filed, or if the person charged shall refuse or neglect to make answer as hereinbefore required, the Disciplinary Panel shall, at a hearing called for that purpose, proceed to consider the charge or charges. The Exchange shall cause copies of the charge or charges and of the answer, if any, and of any documents submitted in support thereof by the person charged, to be mailed or otherwise delivered to each member of the Disciplinary Panel at least five days before such hearing. Notice of such hearing shall be sent to the person charged; he shall be entitled to be present personally at the hearing, and shall be permitted to examine and cross-examine all witnesses produced at the hearing and also to present such testimony, defense or explanation as may be deemed responsive to the charge or charges. Any witnesses produced by the person charged shall be subject to cross-examination. After hearing all witnesses produced at the hearing and after hearing the person charged, the Disciplinary Panel shall by a majority vote determine whether or not the employee or prospective employee is guilty of the offense or offenses charged. If it determines that the person charged is guilty, the Disciplinary Panel shall by a majority vote impose the penalty or prescribe the action to be taken by the Exchange in accordance with paragraph (a) or (b) of this rule. A written notice stating the determination made by the Disciplinary Panel shall be served upon the person charged in the manner hereinbefore provided, and a copy thereof shall be sent to each member of the Board of Governors. The determination of the Disciplinary Panel and any penalty or other action prescribed shall become final and conclusive twenty days after notification thereof to the person charged, provided, however, that if a request for review of such determination, or of any penalty or other action prescribed by the Disciplinary Panel, is filed in writing with the Secretary of the Exchange as provided in paragraph (e) of this rule, the penalty or other action prescribed by the Disciplinary Panel shall be stayed pending the result of such review.

(e) Any person determined to be guilty of a charge or charges before an Exchange Disciplinary Panel pursuant to this rule may obtain a review of such determination or of any penalty or other action prescribed by the Disciplinary Panel in accordance with paragraph (a) or (b) of this rule, or of both the determination and such penalty or other action. Upon the request of any four members of the Board of Governors, any determination by a Disciplinary Panel pursuant to this rule or any penalty or other action prescribed by such Disciplinary Panel, or both, shall be subject to review as hereinafter provided. A request for review of such determination, penalty or other action shall be made in writing and filed with the Secretary of the Exchange within twenty days after notification of the determination and penalty, if any, is served upon the person charged. The review of any disciplinary proceeding as herein provided may be conducted by the Board of Governors, or in its discretion may be delegated to a committee of governors appointed by the Chairman with the approval of the Board. In connection with any such review, the Board or the review committee, as the case may be, may affirm any determination by the Disciplinary Panel or sustain any penalty or other action prescribed, or both, may modify or reverse any such determination, or may decrease or eliminate any penalty or other action prescribed in accordance with paragraph (a) or (b) of this rule, or impose any lesser penalty or prescribe any lesser action permitted under paragraph (a) or (b) of this rule, as it deems appropriate; or if the Board or such review committee shall determine that the Disciplinary Panel has not adequately considered all of the matters which should have been considered in connection with the charge or charges, or has improperly applied or interpreted the Constitution, rules, requirements and policies of the Exchange, or has prescribed action

or has imposed a penalty or penalties which the Board or such review committee determines to be inadequate in light of all the circumstances, the Board or such review committee may remand the matter to the Disciplinary Panel for further consideration consistent with such determination. Upon such remand, the Disciplinary Panel shall conduct a further hearing in accordance with the provisions of this rule and may as a result thereof modify, reverse or reaffirm its previous determination or prescribe any action or impose any penalty permitted under paragraph (a) or (b) of this rule regardless of whether such action or penalty shall be greater than the action prescribed or penalty imposed as a result of the original hearing. Any determination, action prescribed or penalty imposed by the Disciplinary Panel as a result of a remand from the Board or a review committee, as the case may be, shall be subject to further review upon request as hereinabove provided. If, upon review, the matter is not remanded to the Disciplinary Panel, the determination and the penalty or other action prescribed, if any, by the Board or the review committee, as the case may be, shall be final and conclusive.

(f) If any employee or prospective employee of a member or member organization is suspended or expelled from any other securities exchange or any national securities association, or is suspended or barred from being associated with any member of such exchange or association, or is suspended or barred by any governmental securities agency from dealing in securities or being associated with any broker or dealer in securities, the Exchange may, in view of such suspension, expulsion or bar, suspend or withdraw its approval of, or disapprove, his employment by a member or member organization, but no such suspension imposed by the Exchange shall commence before or expire after the suspension imposed by such other exchange, association or agency, and no such withdrawal of approval and no such disapproval shall be imposed by the Exchange unless such employee or prospective employee has been expelled or barred by such other exchange, association or agency. Nothing in this paragraph (f) shall preclude any proceeding against any employee or prospective employee under the foregoing provisions of this Rule 345. In any proceeding under this paragraph (f), the method of procedure required by paragraphs (c) and (d) of this rule shall not apply, but the employee or prospective employee shall be given not less than ten days' notice in writing of a hearing before an Exchange Disciplinary Panel to determine whether or not the Exchange shall suspend or withdraw its approval of, or disapprove, as the case may be, his employment by a member or member organization, as provided herein. At such hearing, the employee or prospective employee shall be afforded an opportunity to explain why it would be inappropriate for the Exchange to accept the finding of such other exchange, association or agency or to suspend or withdraw its approval of, or disapprove, his employment, notwithstanding his suspension, expulsion or bar by such other exchange, association or agency. The Disciplinary Panel shall thereupon on behalf of the Exchange determine the matter by a majority vote. In the event that the Disciplinary Panel determines that the Exchange should not accept the finding of guilt by such other exchange, association or agency, it may order a proceeding under any other paragraph of this rule. In the event that the employee or prospective employee fails or refuses to appear at such hearing, the Disciplinary Panel may nevertheless determine the matter and suspend or withdraw Exchange approval of, or disapprove, his employment or prospective employment as provided herein. Written notice of the result shall be served upon the employee or prospective employee in the manner hereinbefore provided by paragraph (c) of this rule and a copy thereof shall be sent to each member of the Board of Governors. Any

action by an Exchange Disciplinary Panel pursuant to this paragraph (f) shall be subject to review in accordance with the procedures specified in paragraph (e) of this rule. In the event no request for review is filed within twenty days after the employee or prospective employee is notified of the determination of the Disciplinary Panel, such determination shall become final and conclusive. Notwithstanding the foregoing, the employee or prospective employee may, nevertheless, consent to the penalty that the Exchange suspend or withdraw its approval of, or disapprove, his employment or prospective employment by a member or member organization solely by reason of the imposition of such penalty by such other exchange, association or agency, and without either the separate determination of an Exchange Disciplinary Panel as provided above in this paragraph (f) or the procedure provided for in the foregoing paragraphs of this rule. Such consent shall be in writing, signed by the employee or prospective employee, and shall be delivered to the Exchange not later than two business days after the Exchange gives notice in writing to him that it intends to proceed under Rule 345(f). The consent shall take effect immediately upon approval by the Exchange.

(g) In accordance with rules adopted by the Board of Governors, the Exchange may publicly disclose its disapproval or suspension or withdrawal of approval of the employment of any employee or prospective employee of a member or member organization and it may publicly disclose any fine, censure or other determination, provided, however, that no such disclosure shall be permitted until there has been a final determination of the matter.

(h) Unless otherwise directed by the Board of Governors, a copy of any accusation under paragraph (c) of this rule or a copy of any notice of hearing under paragraph (f) of this rule served on an employee or a prospective employee of a member or member organization shall be furnished to his employer or prospective employer and a representative of the employer or prospective employer may be present at the hearing of the matter.

(i) An Exchange Disciplinary Panel, selected in accordance with the provisions of Sections 1(b)(1) and 1(b)(2) of Article V of the Constitution, at a hearing called for that purpose may determine whether an employee or prospective employee of a member or member organization is guilty of having committd an offense or offenses on the basis of a written stipulation of facts and consent to a specified penalty entered into between such employee or prospective employee and any officer of the Exchange, and may fix and impose the penalty or prescribe such other action to be taken by the Exchange in accordance with paragraph (a) or (b) of this rule as shall be agreed to in such stipulation and consent, or impose any lesser penalty or prescribe any lesser action permitted under paragraph (a) or (b) of this rule. A written notice of the result shall be served upon the employee or prospective employee in the manner provided in paragraph (c) of this rule and a copy thereof shall be sent to each member of the Board of Governors. The determination of the Disciplinary Panel and any penalty or other action prescribed shall become final and conclusive ten days after notification thereof to the employee or prospective employee, provided, however, that if a request for review of such determination or, of any penalty or other action prescribed by the Disciplinary Panel, is filed as hereinafter provided, the penalty or other action prescribed by the Disciplinary Panel shall be stayed pending the result of such review. If the Disciplinary Panel rejects the stipulation and consent to a specified penalty, the matter shall proceed as if the stipulation and consent had not been entered into, and such stipulation and consent shall be

disregarded in any subsequent proceeding. A written notice of such rejection by the Disciplinary Panel shall be served upon the employee or prospective employee in the manner provided in paragraph (c) of this rule.

Upon the request of any four members of the Board of Governors, the Board shall review the determination of, or the penalty or other action prescribed by, a Disciplinary Panel in connection with a written stipulation of facts and consent to a specified penalty. A request for review by the Board of such determination, penalty or other action shall be made in writing and filed with the Secretary of the Exchange within ten days after notification of the determination and penalty, if any, is served upon the employee or prospective employee. Upon review, the Board may fix and impose the penalty or prescribe such action to be taken by the Exchange in accordance with paragraph (a) or (b) of this rule as shall have been agreed to in such stipulation and consent, impose any lesser penalty or prescribe any lesser action permitted under paragraph (a) or (b) of this rule, or reject such stipulation and consent, as it deems appropriate. The quorum and vote required for such action by the Board shall be the quorum and vote provided in Section 1(b)(5) of Article V of the Constitution.

Amendment.

Adopted July 29, 1965, effective August 16, 1965.
November 19, 1969.
February 26, 1971.

Service of # 2 copies of the
within Brief & Supp App is hereby
admitted this 15 day of
May 1974

Signed [illegible]

Attorney for Plaintiff

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